

STATE OF TENNESSEE

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Opinion No. 05-020

Chiropractors' Practice

QUESTIONS

1. Does Tenn. Code Ann. § 63-4-101(a) permit chiropractors to include in their practices as a treatment modality the insertion of needles with the intent to bring about the same result as the needle insertion techniques applied in the practice of acupuncture?

2. If the answer to the above question is yes, may chiropractors then utilize the terms “acupuncture” and “the practice of acupuncture” as defined in Tenn. Code Ann. § 63-6-1001(2) and (7), in combination with any other descriptive word, either to describe that needle insertion modality or to advertise that their practices include such needle insertion modalities?

OPINIONS

1. No. Since the Legislature has determined that acupuncture and the practice of acupuncture is a branch of medicine, chiropractors may not, under the authority of Tenn. Code Ann. § 63-4-101(a), practice a treatment modality that involves the insertion of needles with the intent to bring about the same result as the needle insertion techniques applied in the practice of acupuncture, without first obtaining a certification to practice acupuncture pursuant to Tenn. Code Ann. §§ 63-6-1001, *et seq.* Therefore, we think additional legislation is required before chiropractors may perform acupuncture or engage in the practice of acupuncture without such certification.

2. Since the answer to the first question is no, we do not address the second question.

ANALYSIS

Tenn. Code Ann. § 63-1-102 declared the practice of acupuncture to be included within the definition of the “practice of the healing arts.” Subsequently, the Legislature included the terms “acupuncture” and “the practice of acupuncture” under the practice act which governs medicine and surgery, Tenn. Code Ann. §§ 63-6-101, *et seq.* In Part 10 of that act, “Acupuncture,” (2000 Pub. Chap. 685), Tenn. Code Ann. § 63-6-1001(2) defines the term “acupuncture”:

“Acupuncture” means a form of health care developed from traditional and modern oriental medical concepts that employs oriental medical diagnosis and treatment, and adjunctive therapies

and diagnostic techniques, for the promotion, maintenance and restoration of health and the prevention of disease.

Further, Tenn. Code Ann. § 63-6-1001(7) defines the term “practice of acupuncture”:

“Practice of acupuncture” means the insertion of acupuncture needles and the application of moxibustion to specific areas of the human body based on oriental medical diagnosis as a primary mode of therapy. Adjunctive therapies within the scope of acupuncture may include acupressure, cupping, thermal and electrical treatment, and the recommendation of dietary guidelines and supplements and therapeutic exercise based on traditional oriental medical concepts.

Thus, the Legislature has determined that “acupuncture” and “the practice of acupuncture” as defined above is a branch of medicine.¹ When considering the relationship of the practice of medicine to the other healing arts, courts of this state have interpreted broadly the language of the practice act which governs medicine and surgery to cover all human illnesses and diseases and their diagnosis, treatment, and prevention. *See Spunt v. Fowinkle*, 572 S.W.2d 259 (Tenn. App.1978); *Ison v. McFall*, 400 S.W.2d 243 (Tenn. 1978). On the other hand, practitioners of the other related healing arts have been strictly limited to the definitions of their particular respective callings. *See Spunt, supra*. Prior to the enactment of Tenn. Code Ann. §§ 63-6-1001, *et seq.*, the relevant statutory authority for acupuncture and the practice of acupuncture was unclear. As we opined prior to the enactment of Tenn. Code Ann. §§ 63-6-1001, *et seq.*, in Op. Tenn. Att’y. Gen. No. 95-027, “an individual cannot practice the healing art of acupuncture unless that person is appropriately licensed pursuant to the provisions of T.C.A. §§ 63-1-101, *et seq.* in accordance with the licensing requirements of the particular health related board under which it falls.” Subsequently, the Legislature defined “acupuncture” and “the practice of acupuncture” specifically under the practice act that governs medicine and surgery, Tenn. Code Ann. §§ 63-6-101, *et seq.*²

Tenn. Code Ann. § 63-6-1003(a) establishes the Tennessee Advisory Committee for Acupuncture to assist the Board of Medical Examiners in the performance of its duties. Tenn. Code Ann. § 63-6-1004 provides that the Board of Medical Examiners, in consultation with the committee, shall promulgate rules and regulations establishing the qualifications and fitness of applicants for certifications, renewals of certifications and reciprocal certifications; establish grounds for revocation, suspension, or denial of certification; establish grounds for placing on probation a holder of a certificate; establish the categories of fees and the amount of fees that may

¹We are informed that the Tennessee Board of Medical Examiners considers the practice of acupuncture to be a “branch of medicine” as defined in the above-referenced sections.

²Our research has revealed that there may be another type of acupuncture known as “clinical acupuncture” that might be distinguishable from acupuncture that is based on oriental medical concepts. We do not know whether or not this is the case. If, however, there is such a valid distinction, the Board of Chiropractic Examiners might wish to address this distinction in its rules.

be imposed in connection with certification; issue declaratory orders pursuant to the Uniform Administrative Procedures Act; if deemed necessary by the committee, establish standards of continuing education; and adopt and use a seal to authenticate official documents of the committee. Moreover, Tenn. Code Ann. § 63-6-1003(b) requires that any actions taken under this section shall only be effective after adoption of a majority vote of the members of the committee and provides further that the Board of Medical Examiners “by a majority vote of its members at the next board meeting at which administrative matters are considered, may rescind any action taken by the committee.” See the Rules of the Tennessee Board of Medical Examiners’ Advisory Committee for Acupuncture, “General Rules and Regulations Governing the Practice of Acupuncturists,” Tenn. Comp. R. & Reg. 0880-12-.01, *et seq.*

Tenn. Code Ann. § 63-6-1005(a) sets out specific requirements for obtaining certification from the Board of Medical Examiners to practice acupuncture. These requirements include: current active status as a diplomate in acupuncture in the National Certification Commission for Acupuncture and Oriental Medicine (“NCCAOM”) or current state licensure in good standing by another state with substantially equivalent or higher standards; and successful completion of a three-year post-secondary training program or acupuncture college program that is accredited by the Accreditation Commission for Acupuncture in Oriental Medicine (“ACAOM”) or in candidacy status or that meets ACAOM’s standards; and successful completion of a NCCAOM-approved clean needle technique course.³ Tenn. Code Ann. § 63-6-1008, “Health concerns,” also requires that individuals shall pass a nationally recognized clean needle technique course before being allowed to practice acupuncture and related techniques. Tenn. Code Ann. § 63-6-1008(3).

There are certain exceptions to the applicability of Tenn. Code Ann. §§ 63-6- 1001, *et seq.*, which are set forth in Tenn. Code Ann. § 63-6-1002. Specifically, the statute does not apply either to physicians licensed under either Title 63, Chapter 6, or Title 63, Chapter 9, or to registered nurses who are nationally certified as holistic nurses and who have successfully completed an accredited education program in acupuncture. Further, Tenn. Code Ann. § 63-6-1002(b) excepts students practicing acupuncture under the supervision of a certified acupuncturist as part of a course of study approved by the committee, as well as individuals who do not otherwise possess the credentials required for the practice of acupuncture under Tenn. Code Ann. §§ 63-6-1001, *et seq.*, or regulations promulgated thereunder by the Board of Medical Examiners who are granted limited certification as an Acupuncture Detoxification Specialist (“ADS”) for the purpose of the treatment of alcoholism, substance abuse, or chemical dependency if they meet all of the conditions set forth in Tenn. Code Ann. § 63-6-1002(b)(2)(A)-(D). Notably, the statute does not except chiropractors.

³Under Tenn. Code Ann. § 63-6-1005(b) and (c), the committee shall waive the requirements of subsection (a) for an applicant residing in Tennessee on January 1, 2001, who presents satisfactory evidence to the committee of successful completion of an approved apprenticeship or tutorial program that meets NCCAOM standards, as well as for an applicant presenting satisfactory evidence to the committee that such applicant held a license in good standing from another state immediately prior to practicing in Tennessee and who has continually practiced in Tennessee since that time; each shall be granted certification by the Tennessee Board of Medical Examiners. Further, Tenn. Code Ann. § 63-6-1005(d) provides for issuance of a limited acupuncture certificate to an Acupuncture Detoxification Specialist (“ADS”) who meets the requirements listed in Tenn. Code Ann. § 63-6-1002.

Tenn. Code Ann. § 63-6-1002(b) provides that “[i]t is otherwise unlawful to practice acupuncture for compensation or gratuitously unless certified under this part.” Further, Tenn. Code Ann. § 63-6-1002(c) states that a violation of this section is a Class C misdemeanor. Moreover, a person who violates Tenn. Code Ann. § 63-6-1002 shall also be subject to the sanctions specified in Tenn. Code Ann. § 63-6-1007.

The scope of chiropractic practice was amended by 2003 Pub. Chap. 166 and now is codified at Tenn. Code Ann. § 63-4-101. The 2003 amendment deleted former sections (a) through (d) of that section. The former section that was removed by 2003 Pub. Chap. 166 provided in pertinent part:

(d) Nothing in this chapter shall be construed to authorize any of the following:

* * *

(3) Penetrating the skin with a needle or other instrument;

* * *

The amended section provides in pertinent part as follows:

(a) The term “chiropractic” where used in this chapter is defined as the science and art of locating and removing interference with nerve transmission and nerve function. A chiropractic physician diagnoses and treats neuromuscular and musculoskeletal conditions through physical agent modalities⁴ and manipulative therapies. The adjustment, manipulation and treatment shall be directed toward restoring and maintaining the normal neuromuscular and musculoskeletal function and health of the patient. A chiropractic physician will also make appropriate health referrals for conditions that may not be treated by physical agent modalities and manipulative therapies. Patient care shall be conducted with due regard for nutrition, environment, hygiene, sanitation, and rehabilitation designed to assist in the restoration and maintenance of the patient’s health. *Nothing in this chapter shall be construed to authorize the chiropractic physician to practice any branch of medicine, osteopathy as defined in chapters 6 and 9 of this title, or surgery, including venipuncture or the prescribing of medication.*

Tenn. Code Ann. § 63-4-101(a) (emphasis added).

The amended scope of chiropractic practice as set out in the above section makes no mention whatsoever of acupuncture or the practice of acupuncture. In fact, Tenn. Code Ann. § 63-4-101(a)

⁴The term “physical agent modalities” is not defined.

provides specifically that “[n]othing in this chapter shall be construed to authorize the chiropractic physician to practice any branch of medicine. . .as defined in chapter[] 6. . .of this title. . .” *Id.* We do not think that the section’s removal of the former statutory prohibition against chiropractors’ “penetrating the skin with a needle or any other instrument” in any way repeals the specific mandates of Tenn. Code Ann. § 63-6-1001, *et seq.* Nor is there any ambiguity between the two practice acts, especially in light of the clear proscription contained in Tenn. Code Ann. § 63-4-101(a) against the chiropractic physician practicing “any branch of medicine. . .as defined in chapter[] 6. . .of this title. . . .”⁵

It is a general principle of statutory construction that repeals by implication are not favored. *Metropolitan Government of Nashville and Davidson County v. Shacklett*, 554 S.W.2d 601, 603 (Tenn. 1977). Since 2003 Pub. Chap. 116 never mentions either acupuncture or the practice of acupuncture, we do not believe that it implies repeal of Tenn. Code Ann. §§ 63-6-1001, *et seq.* We do not believe that a reasonable interpretation of Tenn. Code Ann. § 63-4-101(a), when read in conjunction with Tenn. Code Ann. § 63-6-1001, *et seq.*, would so suggest. Further, the Legislature is presumed to know the state of the law on the subject under consideration. *Equitable Life Assurance Co. v. Odle*, 547 S.W.2d 939 (Tenn. 1977). This presumed knowledge includes the existing regulatory scheme. *Brown-Forman Distillers Corp. v. Olsen*, 676 S.W. 2d 567 (Tenn. App. 1984). Since the provisions of Tenn. Code Ann. §§ 63-6-1001, *et seq.* (which were in effect at the time Tenn. Code Ann. § 63-4-101 was amended), clearly define and circumscribe the parameters of the practice of acupuncture in this state; lodge its regulatory scheme squarely under the Board of Medical Examiners in consultation with the Tennessee Advisory Committee for Acupuncture; make violations of its certification requirements a criminal offense; and do not include chiropractors among the categories of individuals to which the part specifically does not apply; we do not believe that the language in the amended chiropractic section, Tenn. Code Ann. § 63-4-101(a), changed the scope of chiropractic practice by expanding it to include the practice of acupuncture. Specifically, we note that when the Legislature enacted the above changes to Tenn. Code Ann. § 63-4-101(a), it did not amend Tenn. Code Ann. §§ 63-6-1001, *et seq.*, to except chiropractors.

Therefore, since the Legislature has determined that acupuncture and the practice of acupuncture is a branch of medicine, we conclude that chiropractors may not, under the authority of Tenn. Code Ann. § 63-4-101(a), practice a treatment modality that involves the insertion of needles with the intent to bring about the same result as the needle insertion techniques applied in the practice of acupuncture as it is defined in Tenn. Code Ann. §§ 63-6-1001, *et seq.*, unless, of course, the chiropractor also holds a certification to practice acupuncture from the Board of Medical

⁵Even if ambiguity did exist between Tenn. Code Ann. § 63-4-101 and Tenn. Code Ann. §§ 63-6-1001, *et seq.*, the legislative history is not entirely clear. The sponsor of the legislation that amended the chiropractic statute stated in a session of the House of Representatives on May 5, 2003, that the bill “also removes the acupuncture prohibition that doctors of chiropractic have been under in Tennessee,” as well as that “[t]his language in the amendment has been agreed to by all parties with both the Tennessee Medical Association and the Tennessee Committee on Acupuncture.” Further, the transcript of the House Health and Human Resources Committee on April 29, 2003 contains discussion about acupuncture. However, no specific mention of acupuncture was made in a Joint General Welfare Committee session on April 23, 2003, and no mention concerning acupuncture was made when the bill was considered by the Senate on April 30, 2003.

Examiners pursuant to Tenn. Code Ann. §§ 63-6-1001, *et seq.* We think additional legislation is required before chiropractors may perform acupuncture or engage in the practice of acupuncture without such certification.

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